

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 04 June 2003

In the Matter of

GEORGE BERGLING
Claimant

Case No.: 2002 DCW 1

OWCP No.: 40 - 180229

v.

BRUFFEY CONSTRUCTION CO.
Employer

Appearances:

Mr. Benjamin T. Boscolo, Attorney
For the Claimant

Mr. Joseph Veith, Attorney
Mr. John Nichols, Attorney
(Monitoring the proceedings on behalf of the Employer)

Before:

Richard T. Stansell-Gamm
Administrative Law Judge

**DECISION AND ORDER -
DENIAL OF MODIFICATION REQUEST
AWARD OF PENALTIES AND INTEREST
REVISED COMPENSATION ORDER**

This case involves a claim by Mr. George Bergling under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 - 950, as amended, ("the Act"), as made applicable by the District of Columbia Workers' Compensation Act, 36 D.C. Code §501 ("DCW").¹ The claim stems from a work-related back injury Mr. Bergling suffered on January 21, 1981.

On November 13, 2001, the DCW Associate Director forwarded to the Office of Administrative Law Judges the pre-hearing statements filed by the Claimant's counsel. Pursuant to Notices of Hearing, dated December 14, 2001 and March 28, 2002, I conducted a formal hearing on March 6, 2002 and May 13, 2002 in Washington, D.C., attended by Mr. Bergling, Mr. Boscolo, Mr.

¹In 1979, the District of Columbia government repealed the 1928 District of Columbia Workers Compensation Act and established its own workers' compensation program. Consequently, only injuries occurring to employees in the District of Columbia prior to July 26, 1982, the effective date of the new program, are covered by the provisions of the Longshore and Harbor Workers' Compensation Act.

Veith (first date) and Mr. Nichols (second date).² My decision in this case is based on the testimony presented at the hearing and all the documents admitted into evidence: Claimant's Exhibit ("CX") 1 to 3.

Issues

1. Whether Mr. Bergling submitted a timely modification request.
2. If Mr. Bergling's modification was timely, whether a mistake of fact exists in the computation of Mr. Bergling's permanent partial disability compensation rate.
3. Whether penalties and interest may be imposed against the Special Fund for failing to render disability compensation payments between September 1, 1995 and December 31, 1998.

Claimant's Position³

Between September 1, 1995 and December 31, 1998, the U.S. Department of Labor ("DOL") failed to pay Mr. Bergling from the Special Fund his weekly compensation for permanent partial disability. After Mr. Bergling retained an attorney in 1999, DOL paid Mr. Bergling a lump sum to cover that period of time. However, Mr. Bergling seeks penalties against DOL for failing to make the payments when they were due.

Initially, Mr. Bergling received weekly compensation for this permanent partial disability in the amount of \$359.65, based on an amount of \$539.47, which represents his average weekly wage at the time of his injury of \$699.47, reduced by his residual earning capacity of \$160 a week. Over the course of several years, Mr. Bergling developed professionally. Sometime in the early 1990s, the District Director met with Mr. Bergling's former counsel and they agreed, without Mr. Bergling's consent, to a modified weekly payment of \$150.00. That figure was established without any reference to what Mr. Bergling's current job would have allowed him to have earned in 1981. Based on a recent labor market survey, Mr. Bergling believes his wage earning capacity in 1981 as a remodeling project manager would have been about \$22,402.00, which is an average weekly wage of \$430.80. Regardless of Mr. Bergling's calculations, the DCW Associate Director has not explained how the revised weekly compensation of \$150.00 was determined. As a result, Mr. Bergling believes a mistake of fact exists in regards to that \$150.00 compensation rate.

Procedural Comment

²Although informed of the proceedings, a representative of the DCW Associate Director did not attend the hearing or enter an appearance.

³Hearing presentations (First Hearing transcript ("TR"), pages 7 to 11, and Second Hearing TR, pages 7 to 13, and 26).

In November 2001, following an informal conference, the DCW Associate Director forwarded the Claimant's pre-hearing statement to the Office of Administrative Law Judges. That statement listed as contested issues both modification of the compensation and penalties for non-compliance of a compensation order between 1995 and 1998. The Associate Director's letter indicated Section 8 (f) was not an issue and copied the forwarding letter to the DOL Associate Solicitor.

At the first hearing, after the introduction of counsel and a statement of the issues, I concluded the Claimant was seeking relief concerning actions taken by a representative of the Special Fund, rather than the Employer. Although counsel for the Employer was present, he stated he was merely observing, and not participating in, the hearing because Mr. Bergling's claim involved a second injury situation and the Employer had already fulfilled its compensation liability under the Act. Thus, DOL/Special Fund, and not the Employer, was the party with the true interest in the proceedings. Although a Notice of Hearing had been sent to the DOL Office of the Solicitor, no one entered an appearance at the March 2002 hearing for the Special Fund. Concerned that DOL may not be aware of the proceeding's true nature, I stopped the hearing in order to provide additional notice to the Office of the Solicitor.

When the Office of the Solicitor was contacted, the representative indicated they did not get involved in these cases, even if the dispute involved modification and the Special Fund, because it was the employer's responsibility to contest liability. Despite that reply, I sent the Office of the Solicitor the Notice of Hearing for the second hearing date. When the hearing resumed in May 2002, the Special Fund remained unrepresented.

A few months after the second hearing, Mr. Boscolo indicated he was attempting to resolve this dispute with the Office of the Solicitor. To date, I have received nothing further from Mr. Boscolo or DOL.

Based on the procedural history, I believe the Special Fund had sufficient opportunity to ascertain the exact nature of this dispute and to enter an appearance. As a result, I have no hesitation in adjudicating this case without any knowledge of the Special Fund's position on the stated issues or any evidence presented on its behalf.

SUMMARY OF EVIDENCE

Mr. George J. Bergling
(Second Hearing TR, pages 15 to 47)

[Direct Examination] On January 21, 1981, Mr. Bergling was supervising the construction of a gas station. Although he was the superintendent, Mr. Bergling actively engaged in the construction work. As he was assisting the pouring of concrete, the cement chute became unlocked and swung towards Mr. Bergling. Trying to duck, he lost his footing, twisted backwards, and fell down the footing head-first about two feet, hitting the mud. The accident caused an injury to his lower back which required the removal of a disc during a September 1982 surgery.

Following the surgery, Mr. Bergling was not able to return to his construction supervisor employment. Consequently, sometime after 1985 he began a new career scheduling construction work in the insurance field. He worked in that capacity until 1993 with the same company. He continued scheduling and now schedules remodeling work for Case Design Remolding. His present title is project manager. Essentially, the company procures a residential remodeling project. Then, Mr. Bergling meets with the homeowner and obtains and schedules the subcontractors for the actual work. As a project manager in 2001, Mr. Bergling earned about \$51,000, or maybe more; he's not sure.

Following Judge Feldman's award of compensation benefits in 1985, Mr. Bergling would periodically receive Forms LS 200 to complete and return to the Special Fund. Every time he received a Form LS 200, Mr. Bergling completed the form and returned it to the Special Fund. Sometime in the early 1990s, he received a call from the person handling the Special Fund for a meeting. When he contacted his lawyer about the meeting, the attorney indicated that while he could not attend, another law partner would be there. At the meeting, another attorney, who Mr. Bergling had never met, was present. He was a young lawyer and Mr. Bergling did not get a chance to talk to him.

At the meeting, no paperwork was presented. No one discussed what a Project Manager, Mr. Bergling's occupation at the time of the meeting, would have made in 1981. The Special Fund representative indicated the compensation benefits were being terminated because Mr. Bergling made too much money. Mr. Bergling objected because he understood the judge's compensation order gave him compensation for life. After about an hour, Mrs. Bergling, rather than the lawyer, and the Special Fund representative agreed the weekly payments would be \$150.00. Mr. Bergling does not recall signing any papers.

Subsequently, a compensation order for weekly payments of \$150.00 was issued and the benefits continued for about a year or two and then stopped. When Mr. Bergling called and complained, they received a new form and sent it in. They received maybe one more check and then the payments stopped again. Mr. Bergling "figured" the Special Fund "just decided to cut it off again."

The second time the payments stopped, Mr. Bergling did not take any action, "Why bother?" Eventually, he was contacted by the Special Fund representative who asked him if he wanted a check for \$26,000. Once they received the check, they looked for a lawyer and contacted Mr. Boscolo.

Since retaining counsel, Mr. Bergling has been attempting to determine his residual earning capacity based on his job as remodeling project manager. As part of that effort, he met with a vocational counselor and they discussed his physical capabilities, background, education, and work experience. Based on that information, she prepared a labor market survey.

Mr. Bergling has not suffered any new injuries to his low back, but it is a continuing problem.

He last saw a doctor about his back in 1990 or 1992.

[ALJ Examination] As part of his work as a superintendent for the gas station construction, Mr. Bergling was responsible for all the work, with the exception of the canopy. At the time of the accident, he was employed by Bruffey Contracting and supervised three or four other construction workers, who were also employees of Bruffey Contracting. Mr. Bergling was making about \$12 an hour but he also worked a lot of overtime. He remembers receiving a check for \$1,700 one week.

After his injury, Mr. Bergling was out of work for “quite a while.” Mr. Bergling believes he returned to work in the spring of 1985.

Concerning his former lawyer, Mr. Bergling explained a communication problem existed because “they can never get my address right.” So, he’s not sure if his former lawyer called him about the Special Fund meeting or if he received notice of the meeting and called his former counsel. Mr. Bergling did not understand the Special Fund representative’s position that he would lose his compensation benefits because he made too much money. He believes his former lawyer told him the award was for life. The Special Fund representative wanted to stop all payment, but they finally agreed to \$150.00 a week. When the payments started coming, he believed that’s all he was going to get.

When Mr. Bergling pursued his initial claim, he did go to a hearing before an administrative law judge with an attorney. Following the hearing, the judge issued a compensation order.

When both the compensation and the LS 200 forms quit coming, Mr. Bergling did nothing because: “It was no sense. You know, in my life, I got to go on with my life. I just can’t keep coming down here.”

[Redirect Examination] In 1981, Mr. Bergling only worked for Bruffey Contracting Corporation. Mr. Bergling’s job involved hard work and required very heavy lifting, bending, stretching, and kneeling.

When he returned to work in the spring of 1985, he was a supervisor of insurance repair. The company repaired damage due to fires and floods. While similar to that insurance work, his present job focuses much more on design and remodeling tasks. He works for various insurance companies. He has been doing this type of work since 1985, continues to supervise people, and periodically conducts quality control inspections of the remodeling work. In 1985, he started at about \$8.00 an hour, forty hours a week.

Mrs. Laura Bergling
(Second Hearing TR, pages 47 to 55)

[Direct Examination] Mrs. Laura Bergling is Mr. Bergling’s wife. She recalls that in September 1995 the checks from the Special Fund stopped arriving. After receipt of a lump sum

payment in January 1999, the payments started again. During that same time frame, the Berglings did not receive a Form LS 200 to complete.

[ALJ Examination] Mrs. Bergling attended the meeting with the Special Fund representative. Also present were Mr. Bergling and the substitute attorney. That lawyer did the talking for Mr. Bergling. The representative had called the meeting because he believed Mr. Bergling was making too much money and intended to stop the compensation payments. The Special Fund representative and the lawyer started negotiating. After the meeting, the checks were reduced from \$355 to \$150 a week. Due to the reduced amount, Mrs. Bergling started looking for work in order to help support their children. She was surprised by the low dollar amount because she was informed that the compensation was called *permanent* partial disability. The Berglings relied on the permanency of that disability compensation to secure a mortgage for their home. When the lower amounts checks started to arrive, the Berglings did not return to see their lawyer, in part because they were very busy.

The lump sum payment did not arrive as a check, instead it was a direct deposit which just showed up one day on their bank statement. Later a letter arrived from the Special Fund representative indicating the lump sum represented "back money" for the period September 1995 until December 1998. The stated reason for the payment was a record review. She calculated the number of missed \$150 weekly payments and concluded the lump sum represented just those payments. It did not include interest. Since then, with only a few exceptions, they have straightened out submissions of the Form LS 200.

February 28, 1985 Decision and Order
(CX 1)

Following a hearing on the merits of Mr. Bergling's compensation claim, Administrative Law Judge Robert J. Feldman issued a Decision and Order on February 28, 1985 awarding Mr. Bergling both temporary total and permanent partial disability compensation under the Act. Based on a medical report, Judge Feldman concluded Mr. Bergling's back condition became permanent on June 15, 1984. Additionally, due to establishment of suitable alternative employment, Judge Feldman determined the extent of Mr. Bergling's disability was partial. Concerning the permanent partial disability compensation, the Employer was directed to pay at the weekly rate of \$359.65 for 104 weeks, based on an average weekly wage at the time of injury, January 21, 1981, of \$699.47, reduced by Mr. Bergling's 1981 residual earning capacity of \$160.00, under the provisions of Section 8 (c) (21). Following completion of the Employer's payment obligation, the Special Fund was directed to pay compensation at the stated rate, under Section 44, "and, continuing, all of the above subject to pertinent provisions of the Act." Judge Feldman also ordered the Employer to pay interest on the previously unpaid installments.

Labor Market Survey
(CX 2)

In March 21, 2001, a vocational specialist prepared a labor market survey addressing Mr. Bergling's potential wage earning capacity in 1981. Based on Mr. Bergling's physical limitations, his past and present work experience, and education, the specialist opined that Mr. Bergling could have earned between \$22,401 and \$24,190 (about \$430 to \$465 a week) as a remodeling project manager in 1981.

Two Forms LS 200
(CX 3)

A Form LS 200, dated August 10, 2000, indicates earnings of \$48,193.98 for Mr. Bergling between "1/1/99" and "12/31/99." A second Form LS 200, dated December 14, 1999, contains conflicting information. In the preprinted portion of the Form, the applicable dates of income are typed as "01/01/98 to 12/31/98." However, in the portion Mr. Bergling completed by hand, he reported an income of \$52,417.11 for the period, "From 1/99 to 12/99."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Issue No. 1 - Timeliness of Modification Request

In his modification request, Mr. Bergling seeks to increase the present Special Fund compensation rate of \$150 to the rate set by Judge Feldman of \$359. However, since the present order was issued sometime in the early 1990s, payments stopped for a time in the mid to late 1990s, and Mr. Bergling did not bring a modification action until about 2001,⁴ a question of the modification's timeliness arises.

Under Section 22 of the Act, 33 U.S.C. § 922, any party in interest may request modification of a compensation order due a mistake of fact or a change in conditions. The central purpose of this provision is to render justice under the Act by giving the trier of fact wide discretion to modify a compensation order by considering newly submitted evidence or to further reflect on the evidence initially submitted. *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989), *O'Keefe v. Aerojet-General Shipyards*, 404 U.S. 254 (1971), and *Hudson v. Southwestern Barge Fleet Servs.*, 16 BRBS 367 (1984). At the same time, Section 22 is not intended to be a back door for retrying or litigating issues. *Delay v. Jones Washington Stevedoring Co.* 31 BRBS 197 (1998). The party requesting the modification has the burden of proof. *Vazquez v. Continental Maritime*, 23 BRBS 428 (1990). Section 22 requires the modification application must be presented within one year "after the date of the last payment, whether or not a compensation order has been issued, or .

⁴In his statement of the case, Mr. Boscolo noted that he had previously brought this case before another administrative law judge in 2000 asserting the Special Fund's representative's compensation order reducing the weekly payments was void in the absence of Mr. Bergling's consent. That administrative law judge indicated Mr. Boscolo needed to bring a modification action instead.

. . the rejection of a claim.”

Metropolitan Stevedore Company v. Rambo (Rambo II), 521 U.S. 121 (1997).

Although I am not able to determine the specific date of the amended compensation order that reduced the weekly payments to \$150, the evidence shows Mr. Bergling received weekly payments in that amount until September 1995. In the three years that followed that “last” payment, Mr. Bergling, assuming his entitlement had stopped, took no action. If nothing further had happened, his modification request would be untimely.

However, Mr. Bergling’s compensation story does not end in September 1995. In January 1999, the Special Fund made a lump sum “catch up” payment, re-instituted the \$150 weekly payments, and has continued those payments. Thus, at the time of the 2001 modification request, Mr. Bergling’s compensation payments were on-going and a “last” payment has not yet been made. Based on these circumstances, I ultimately conclude Mr. Bergling’s modification request is timely and should be considered.

Issue No. 2 - Modification

In his modification request, Mr. Bergling asserts a mistake of fact was made in determining that the weekly compensation rate should be \$150. To establish the mistake of fact, Mr. Bergling has presented a) Judge Feldman’s compensation order setting the weekly permanent partial compensation rate at \$359.65; b) a labor market survey showing he could have earned about a \$430 to \$465 a week in 1981 as a remodeling project manager; and c) evidence concerning his recent income as a project manager.

A mistake of fact may serve as a basis for modifying a compensation order. In that regard, a fact finder has broad discretion to correct mistakes of fact, as demonstrated by wholly new evidence, cumulative evidence, or merely further reflection. *O’Keefe*, 404 U.S. at 254. A party may seek a modification on the basis of a mistake of fact even if the compensation award based on the alleged mistake was affirmed on appeal. *Hudson*, 16 BRBS at 367. Facts relating to the nature and extent of the claimant’s disability have been determined to be proper subjects for modification consideration. See *Allen v. Strachen Shipping Co.*, 11 BRBS 864 (1980).

In light of the nature of this modification request and the presentations at the hearing, I believe a beneficial framework for analysis is a detailed review of disability compensation under the Act. In the Longshoreman and Harbor Workers’ Compensation Act, 33 U.S.C. §§ 901 - 950, Congress characterized a longshoreman’s inability to work due to a work-related injury in terms of the nature of the disability (permanent or temporary) and extent of the disability (total or partial). In a claim for disability compensation, the claimant has the burden of proving, through the preponderance of the evidence, both the nature and extent of disability. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 59 (1985).

Nature

The nature of a disability, which focuses on treatment of the injury itself, may be either temporary or permanent. Although the consequences of a work-related injury may require long term medical treatment, an injured employee reaches maximum medical improvement (“MMI”) when his condition has stabilized. *Cherry v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 857 (1978). The nature of the worker’s injured condition becomes permanent and the worker has reached maximum medical improvement when the individual has received the maximum benefit of medical treatment such that his injured condition will not improve. *Trask*, 17 BRBS at 60. Any disability suffered by a claimant prior to MMI is considered temporary in nature. *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984). If a claimant has any residual disability after reaching MMI, then the nature of the disability is permanent because no improvement in the injured condition is expected.

In Mr. Bergling’s case, following his January 21, 1981 accident, he struggled with chronic low back problems that precluded his return to work with the Employer and eventually required surgery. During this period, the nature of his injured condition was temporary because it neither stabilized nor received maximum benefit of medical treatment. Subsequently, as determined by Judge Feldman, following surgery and rehabilitation, a physician concluded Mr. Bergling had received the maximum benefit of medical treatment for his back injury on June 14, 1984. As of that date, Mr. Bergling reached MMI and the nature of his back condition due to his injury, and any associated residual disability, changed from temporary to permanent.

Both Mr. and Mrs. Bergling objected to the reduction of his weekly disability compensation rate because they understood Judge Feldman’s compensation award to be permanent. As demonstrated above, the term “permanent” under the Act does not refer to the duration of the compensation benefits. Instead, the term under the Act means Mr. Bergling’s back condition, and corresponding physical disability, is not expected to improve and thus has become a “permanent” condition.

Extent

The question of the extent of a disability, total or partial, is an economic as well as a medical concept. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). Significantly, the Act defines disability as an incapacity, due to an injury, to earn wages which the employee was receiving at the time of injury in the same or other employment. *McBride v. Eastman Kodak Co.*, 844 F.2d 797 (D.C. Cir. 1988). Total disability occurs if a claimant is not able to adequately return to his pre-injury, regular, full-time employment. *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190, 194 (1984). A disability compensation award requires a causal connection between the claimant’s physical injury and his inability to obtain work. The claimant must show an economic loss coupled with a physical and/or psychological impairment. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). Under this standard, a claimant may be found to have either suffered no loss, a partial loss, or a total loss of wage-earning capacity.

Because extent of disability is measured in economic terms, the foundation for determining any such loss is the wages a claimant was actually earning just prior to suffering the work place accident. This wage measuring stick is called the “average weekly wage” and determined under Section 10 of the Act. In Mr. Bergling’s case, applying the provisions of Section 10 (c) and (d), 33 U.S.C. § 910 (c) and (d), Judge Feldman determined his average weekly wage on January 21, 1981, the date of the accident that caused his back injury, was \$699.47.

At this point, I note the 2001 Labor Market Survey which estimated Mr. Bergling’s potential wages in 1981 as a renovation project manager has no relevance on determining the average weekly wage. The key figure is Mr. Bergling’s actual wages as construction supervisor and an employee covered by the Act at the time of the injury, and not a hypothetical figure based on his new, post-injury career field. Additionally, even if the potential wages in the labor market survey were somehow applicable, Mr. Bergling was earning considerably more as a construction supervisor, \$699.47 a week, than he would have as a project manager for renovation work in 1981 at \$430 to \$465 a week. Thus, Judge Feldman’s average weekly wage determination is much more favorable to Mr. Bergling’s compensation claim.

Once the pre-injury average weekly wage is determined, calculating the actual amount of economic loss due to inability to earn an income after a work-related injury involves a three step process. *SEACO and Signal Mutual Indemnity Assoc., Limited v. Bess*, 120 F. 3d 262 (4th Cir. 1997) (unpublished); *see also, Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 542 (4th Cir.1988). As a first step, to establish a *prima facie* case of total disability, whether temporary or permanent in nature, a claimant has the initial burden of proof to show that he cannot return to his regular or usual employment due to work-related injuries. This evaluation of loss of wage earning capacity focuses both on the work that an injured employee is still able to perform and the availability of that type of work which he or she can do. *McBride*, 844 F. 2d at 798. A claimant’s credible testimony of considerable pain while performing work may be a sufficient basis for a disability compensation even though other evidence indicates the claimant has the capacity to do certain types of work. *Mijangos v. Avondale Shipping, Inc.*, 948 F. 2d 194 (8th Cir. 1999) and *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). In addition, a physician opinion that the employee’s return to his usual or similar work would aggravate his condition may also be sufficient to support a finding of disability. *Case v. Washington Metro. Area Transt. Auth.*, 21 BRBS 248 (1988).

Following his January 21, 1981 injury, subsequent back surgery, and rehabilitation, Mr. Bergling was clearly no longer physically capable of the extensive back movements and heavy lifting requirements of his job as a construction supervisor for Bruffey Construction. As a result, he established a *prima facie* case of total disability. That is, due to the injury he suffered a complete loss of his ability to earn a living as a construction supervisor.

In the second adjudication step, if the claimant is able to demonstrate he is unable to return to his former job, then the employer has the burden of production to show that suitable alternate employment is available. *Nguyen v. Ebbside Fabricators*, 19 BRBS 142 (1986). The availability of suitable alternative employment involves defining the type of jobs the injured worker is reasonably capable of performing, considering his age, education, work experience and physical restrictions, and

determining whether such jobs are reasonably available in the local community. *Newport News Shipbuilding and Dry Dock Co. v. Director, OWCP*, 592 F.2d 762, 765 (4th Cir. 1978) and *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981).

Before Judge Feldman, the Employer presented evidence that although Mr. Bergling suffered some physical limitations due to his back injury, employment existed in the local area that was suitable for him, considering his physical limitations, experience and education. Relying on this vocational evidence, Judge Feldman concluded Mr. Bergling retained the capacity in 1981 to earn at least \$4.00 an hour, representing a weekly salary of \$160.

At the third step, if the employer demonstrates that suitable alternate employment was available, then to meet his burden of proof, the claimant must show he has tried to obtain such alternate employment but has been unable to do so. *Newport News Shipbuilding & Dry Dock Shipping Corp. v. Director, OWCP*, 784 F. 2d 687 (5th Cir. 986), *cert. denied*, 479 U.S. 826 (1986). *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1043 (5th Cir. 1981) *rev'g* 5 BRBS 418 (1977) and *Williams v. Halter Marine Service*, 19 BRBS 248 (1987). If the claimant is not successful at this third stage, he is considered employable and, at the most, the extent of economic disability is partial, not total. *See Southern v. Farmers Export Co.*, 17 BRBS 64 (1985) and *Director, Office of Worker's Compensation Programs v. Berkstresser*, 921 F. 2d 306, 312 (D.C. Cir. 1991).

In the proceeding before Judge Feldman, Mr. Bergling apparently did not offer sufficient evidence to demonstrate that the presented suitable alternative employment was not, in reality, available. As a result, Judge Feldman concluded that the extent of Mr. Bergling's disability was partial and not total.

Permanent Partial Disability Compensation

Judge Feldman's Compensation Determination

As set out above, at the conclusion of his consideration of the nature and extent of Mr. Bergling's disability, Judge Feldman concluded he had a permanent partial disability. The method and amount of the actual compensation for a permanent partial disability is established by Section 8 (c) of the Act, 33 U.S.C. § 908 (c). In the first portion of this section, Sections 8 (c) (1) to (c) (17), compensation for numerous types of injuries, such as loss of a leg, is established by a specific schedule of awards. For other injuries not listed in this schedule, such as a back injury, Section 8 (c) (21) bases permanent partial disability compensation on two-thirds the difference between the average weekly wage of the employee and the employee's wage-earning capacity thereafter in the same or another employment. Again, based on the presentations at the hearing, I feel compelled to set out the specific statutory language. Section (c) (21) states:

Other cases: In all other cases in the class of disability, the compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee

and the employee's wage earning capacity thereafter in the same employment or otherwise, payable *during the continuance of partial disability* (emphasis added).

Leaving nothing to chance, the statute also directs in Section 8 (h) how the wage-earning capacity should be determined. According to that provision, the first preference is the employee's actual post-injury earnings if they fairly and reasonably reflect the employee's wage earning capacity. If actual post-injury earnings do not exist, the wage earning capacity is fixed upon consideration of the nature of the injury, usual employment, degree of physical impairment, and other factors or circumstances that may affect the ability to earn wages in a disabled condition.

At the time of the 1985 hearing, Mr. Bergling had not returned to full employment, such that he had established an actual post-injury wage earning capacity. As a result, Judge Feldman utilized the later method in Section 8 (h), applied the wages from the suitable alternative employment identified in the vocational evidence, and established a weekly figure of \$160 as Mr. Bergling's post-injury wage earning capacity. Then, using Mr. Bergling's pre-injury average weekly wage of \$699.47, and reducing that amount by his post-injury earning ability of \$160, Judge Feldman arrived at the weekly permanent partial disability compensation rate of \$359.65 under Section 8 (c) (21) by the following calculation: $[(\$699.75) - (\$160) = \$539.45] \times 2/3 = \359.65 .⁵

After the Employer completed its 104 week payment obligation, under Section 8 (f), 33 U.S.C. § 908 (f) the Special Fund commenced weekly permanent partial disability at the compensation rate ordered by Judge Feldman and continued to do so until sometime in the early 1990s, when a new compensation order was issued that directed the Special Fund to compensate Mr. Bergling for his permanent partial disability in the weekly amount of \$150.00.

Special Fund Compensation Determination

The specific question before me is whether the amended compensation order directing weekly payments of \$150 should now be modified based on a mistake of fact to restore Judge Feldman's original weekly compensation rate of \$359.65. The short answer is no. The longer answer set out below explains why and leads to an unintended consequence for Mr. Bergling.

Since Mr. Bergling is receiving permanent partial disability compensation under Section 8 (c) (21), two figures set the parameters of his compensation. The first number, Mr. Bergling's pre-injury average weekly wage, was determined by Judge Feldman. Upon my review of his adjudication concerning average weekly wage, I find no mistake of fact. Consequently, Mr. Bergling's pre-injury average weekly wage was \$699.47. Because that number represents Mr. Bergling's wage earning capacity just before his back injury on January 21, 1981, it remains fixed.

⁵To the extent the 2001 Labor Market Survey was presented to show that Mr. Bergling was capable of earning up to \$465 a week in 1981, I note that figure would produce a compensation rate lower than Judge Feldman's \$359, as follows: $[(\$699.47) - (\$465) = \$234.47] \times 2/3 = \156.31 .

The second critical number in establishing Mr. Bergling's rate of disability compensation is his post-injury wage earning capacity. Since the future holds many possibilities for a claimant, that second number, unlike the pre-injury average weekly wage, is subject to change. When Judge Feldman determined Mr. Bergling's weekly permanent partial disability compensation rate of \$359.65, Mr. Bergling had not completely returned to the work force. As a result, Judge Feldman's determination of a 1981 post-injury weekly wage earning capacity of \$160 based on vocational evidence was accurate at that time.

Laudably, Mr. Bergling redirected his obvious supervisory and managerial talents to insurance reconstruction and renovation projects, returning to work full time in the spring of 1985, about the same time Judge Feldman issued his decision. While Judge Feldman used the vocational specialist's evidence to establish a 1981 post-injury wage earning capacity of \$160 a week, Mr. Bergling's return to full time work now enables his residual wage earning capacity to be determined by his actual earned wages.

To assess the impact of Mr. Bergling's actual earnings on his disability compensation and determine whether Mr. Bergling continues to have an economic disability or loss due to his partially physically disabling injury, I must return to Section 8 (h) and apply some principles established by the appellate board.

Because the relevant time of inquiry concerning the disability compensation rate is the date of injury, the Benefits Review Board ("BRB") in *Richardson v. General Dynamics Corp.*, 23 BRBS 327, 330 and 331 (1990), stated post-injury wages must be adjusted to wage levels that were paid at the time of injury. According to the BRB, since the U.S. Department of Labor National Average Weekly Wage ("NAWW") is a more accurate reflection of wage changes over time than the Consumer Price Index, the post-injury wage should be adjusted downward to the time of injury using the NAWW. In *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4, 7 (1988), the BRB further explained that in order to neutralize the effect of inflation, an administrative law judge must adjust the post-injury wage level to the level paid at the time of injury and then compare the pre-injury average weekly wage with the adjusted post-injury wage.

Mistake of Fact Determination

With this lengthy preface and explanation in mind, I now turn to the actual details associated with the mistake of fact issue and focus on Mr. Bergling's post-injury earning capacity during two specific time periods.

Early 1990s

In the early 1990s, the Special Fund representative reduced Mr. Bergling's compensation rate from \$359.65 a week to \$150.00. Since Mr. Bergling's pre-injury average weekly wage remained fixed, that reduction in compensation rate must have been based on a purported change in his post-injury wage earning capacity which occurred after Judge Feldman's 1985 compensation order. Most likely, the representative was responding to Mr. Bergling's reported annual income on his Form LS 200.

Mr. Bergling asserts that rate change in the early 1990s was incorrect and based on a mistake of fact. Unfortunately, I lack two significant pieces of evidence concerning the compensation rate change which precludes my finding a mistake of fact occurred at that time. First, as reflected by the caption for this paragraph, Mr. Bergling did not submit the modified Special Fund compensation order for my consideration. Absent that order, I know neither the basis for the alteration nor even the date of the change. Second, and more importantly, I lack any information about Mr. Bergling's earnings from that time period. Without that information, I am unable to recalculate Mr. Bergling's residual weekly earning capacity and the corresponding weekly permanent partial disability compensation rate. Consequently, I can not determine whether the rate reduction to \$150 a week was a mistake. As the party seeking modification relief under Section 22, Mr. Bergling bears the burden of proof of showing a mistake was made. For this time period, he failed to meet that burden.

At the same time, I want to re-emphasize, as the Special Fund representative argued in the early 1990s, Mr. Bergling's self-improvement and professional recovery from his back injury and the restoration of his wage earning capacity may have had the effect of reducing the economic loss associated with his injury thereby diminishing, or even eliminating, the justification for his disability compensation under the Act. As highlighted in the Section 8 (c) (21) direct quote, the point to remember is that entitlement to permanent partial disability compensation continues only as long as the economic disability (the resulting loss of wage earning capacity due to the injury in comparison to the pre-injury ability to earn income) continues or endures.

Understanding this concept, also helps explain the purpose of the annual Form LS 200, which seeks the current, wage earning capacity of an individual receiving compensation under the Act in order to permit reassessment of the claimant's loss of wage earning capacity. If after his return to full time employment, Mr. Bergling earned more than \$160 a week (\$8,320 annually), and he reported his increased income on the Form LS 200, then the action by the Special Fund representative to change Mr. Bergling's weekly compensation rate was appropriate and not a mistake or abuse of discretion. Under Section 8 (c) (21), if the information provided on the Form LS 200 indicates a person receiving permanent partial disability compensation under Section 8 (c) (21) has recovered sufficiently to earn his pre-injury average weekly wage, despite any residual permanent physical disability, disability compensation under the Act is no longer warranted.

2001

Although Mr. Bergling has failed to prove that the Special Fund representative mistakenly revised his compensation rate in the early 1990s, Mr. Bergling did provide some recent wage earning evidence in an apparent effort to support an argument that from today's perspective, the rate change involved a mistake of fact.

First, Mr. Bergling submitted two Forms LS 200 (CX 3). Unfortunately, due to the confusion created by the December 14, 1999 Form LS 2000, I am unable to rely on those two documents. Specifically, although the Form LS 200, dated December 14, 1999, requested Mr. Bergling's income

for 1998, he completed the form by indicating he earned \$52,411 between “1/99” and “12/99.” Then, on August 10, 2000, Mr. Bergling reported on a second Form LS 200 that he earned \$48,193 in 1999. The internal discrepancy within the December 1999 Form LS 200 and the conflict between the two reports were not addressed at the hearing. Mostly likely, the second Form LS 200 completed in August 2000 does accurately report his income for 1999 and the first Form LS 200 really reflects his 1998 earnings. But, I’m not sure.

Mr. Bergling provided another source of current income evidence through his testimony. While expressing some hesitancy about complete accuracy, Mr. Bergling did indicate that he earned at least \$51,000 in 2001. Due to the confusion over the two Forms LS 200, I consider Mr. Bergling’s income estimate for 2001 to be the more reliable, and most recent, indication of his present wage earning capacity. Based on that information, I now consider whether the revised weekly compensation rate of \$150 is a mistake as of the end of 2001.⁶ That is, after December 2001, did Mr. Bergling continue to suffer an adverse effect on his wage earning capacity due to his January 1981 back injury such that the weekly \$150 compensation rate was a mistake and the former rate of \$359.65 should be restored?

On the basis of his testimony, I conclude Mr. Bergling’s actual annual earnings for 2001 of \$51,000 reasonably and fairly represents his present wage-earning capacity. Having earned \$51,000 for that year, Mr. Bergling’s weekly wage earning capacity in 2001 was \$980.77 a week. Recalling the BRB’s instructions, I must translate Mr. Bergling’s 2001 weekly wage rate back to the wage level existing at the time of his injury in January 1981 using the National Average Weekly Wage information from 1981 and 2001. In January 1981, the NAWW was \$248.35.⁷ For most of 2001, through the end of September, the NAWW was \$466.91. Using the ratio of these two NAWW figures, 0.532 (248.35/466.91), to bring Mr. Bergling’s 2001 weekly wage rate down to the January 1981 wage level, I find his 2001 weekly wage of \$980.77 represents a January 1981 weekly wage earning capacity of \$521.77 ($\980.77×0.532).

After this adjustment based on NAWW, the appropriate permanent partial disability compensation rate after December 2001 can be calculated under Section 8 (c) (21). Again, Mr. Bergling’s January 1981 pre-injury average weekly wage has remained fixed at \$699.47. Based on his 2001 actual earnings, his NAWW-adjusted, post-injury wage earning capacity in 1981 dollars is \$521.77. Under Section 8 (c) (21), the difference between these two wage figures, \$177.77 ($\$699.47 - \521.77), times two-thirds, yields a compensation rate of \$118.47.

Recalling that based on vocational information Judge Feldman used \$160 a week as Mr. Bergling’s 1981 post-injury wage earning capacity, this marked reduction in compensation rate from

⁶Perhaps a more appropriate adjudication rationale is whether under Section 22, a change of conditions, reflected by Mr. Bergling’s most recent income earnings, warrants modification of the existing compensation order.

⁷See www.dol.gov/esa/owcp/dlhwc/nawwinfo.htm for NAWW amounts for each year.

\$359.65 to \$118.47 is understandable, since Mr. Bergling's present actual post-injury weekly wage earning capacity, in 1981 dollars, is \$521.77, more than three times greater than Judge Feldman's figure.

Due to Mr. Bergling's much enhanced wage earning capacity, as of December 2001, the more appropriate permanent partial disability compensation rate is \$118.47. That determination does partially support Mr. Bergling's position because it shows the \$150 weekly compensation rate is wrong. However, Mr. Bergling seeks to modify the present \$150 weekly compensation rate to the former rate of \$359.65. Clearly, that modification request must be denied.

Issue No. 3 - Penalties and Interest

Between September 1, 1995 and December 31, 1998, Mr. Bergling did not receive his weekly compensation from the Special Fund. In January 1999, Mr. Bergling received a lump sum payment of \$26,000 which represented payment of the missing compensation.⁸ Mr. Bergling asks that a penalty be imposed against the Special Fund for the delayed payments. Also, implicit in Mrs. Bergling's testimony that according to her calculations the lump sum did not include interest, I will also view his penalty request as a demand for an award of interest.

Penalties

Under Section 14 (f), a 20% penalty may be imposed if disability compensation is not paid in a timely manner. Specifically, if any compensation payments are due under the Act, and the compensation is not paid within ten days after it becomes due, then "there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation." 33 U.S.C. § 914 (f). According to the Benefits Review Board, the Special Fund may be held liable for Section 14 (f) assessments. *Lawson v. Atlantic & Gulf Stevedores*, 9 BRBS 855, 859 (1981).

Before September 1, 1995, the Special Fund rendered weekly disability compensation payments to Mr. Bergling at the rate of \$150 pursuant to a revised compensation order. On September 1, 1995, payments due under that compensation order stopped and did not resume until January 1999. Based on the limited testimony I received on the suspension of those payments, a possible explanation may involve a dispute over submission of the annual Form LS 200. However, as mentioned in my procedural comment, notably absent in this proceeding was a representative from the Special Fund. Thus, not surprisingly, I have no evidence from the Special Fund which might represent a factual defense against the imposition of penalties under Section 14 (f).

Consequently, I find that permanent partial disability compensation payments in the amount

⁸Simple math confirms Mrs. Bergling's testimony that lump sum payment did not include interest. The period September 1, 1995 to December 31, 1998 represents 173.3 weeks. Those number of weeks, 173.3, times the weekly compensation rate of \$150.00 equals \$25,993.00.

of \$150.00 were due to Mr. Bergling each week between September 1, 1995 and December 31, 1998, payable by the Special Fund. The Special Fund did not tender the weekly payments to Mr. Bergling between September 1, 1995 and December 31, 1998 within ten days of the payment due dates. Accordingly, I find the Special Fund liable for a Section 14 (f) penalty assessment for each late permanent partial disability compensation payment due between September 1, 1995 and December 31, 1998.

Interest

Although the Act does not provide interest to be paid on past due benefits, the BRB and courts have determined interest awards are consistent the Act in order to make a claimant whole for his injuries. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP (Watkins)*, 594 F.2d 986, 987 (4th Cir. 1979). Such interest is due on all overdue amounts as of the date each compensation payment was due. *Schreck v. Newport News Shipbuilding & Dry Dock Co.*, 10 BRBS 611, 613 (1978) and *see Canamore v. Todd Shipyards Corp.*, 13 BRBS 911 (1981). The applicable rate of interest is calculated pursuant to 28 U.S.C. § 1961. *Grant v. Portland Stevedoring Co.*, 17 BRBS 20, 22-23 (1985). Since the Special Fund is not the property of the United States, the principle that interest on claims against the United States is not recoverable unless specifically authorized is not applicable. *Lawson*, 9 BRBS at 859. Instead, interest is chargeable against the Special Fund where the Special Fund had the use an income from the use of the compensation due the claimant. *See Maltese v. Universal Terminal & Stevedoring Corp.*, 12 BRBS 123 (1979). Finally, because the BRB considers Section 14 (f) penalties to be compensation, interest is also assessed on amounts due under Section 14 (f). *See McKamie v. Transworld Drilling Co.*, 7 BRBS 15, *overruled on other grounds*, *Ion v. Duluth, Missabe & Iron Range Railway Co.*, 31 BRBS 76 (1997).

Again, in the absence of any factual defense by the Special Fund, I conclude Mr. Bergling is entitled to an interest award for each of his weekly permanent partial disability compensation payments that were due to be paid between September 1, 1995 and December 31, 1998 for the period of time between the payment due date of each individual payment and January 1999 when Mr. Bergling received the lump sum payment covering the past due payments. The interest will be calculated pursuant to 28 U.S.C. § 1961.

Likewise, since I have imposed penalties under Section 14 (f), the Special Fund must also pay interest on that compensation amount in accordance with 28 U.S.C. § 1961.

REVISED COMPENSATION ORDER

In the process of adjudicating Mr. Bergling's request to modify the present weekly compensation rate of \$150 to the prior rate of \$359.65, I had to evaluate whether the present \$150 weekly compensation rate was the appropriate compensation rate. I determined that it was not the correct rate as of the end of 2001. That conclusion has an unintended consequence for Mr. Bergling since I found the weekly compensation rate of \$150 to be incorrect because it is excessive.

Based on Mr. Bergling's 2001 annual wage income of \$51,000, the more appropriate weekly permanent partial disability compensation rate is \$118.47 as of January 1, 2002, rather than \$150 a week. Accordingly, I now modify Mr. Bergling's entitlement to permanent partial disability compensation. Effective January 1, 2002, and continuing, Mr. Bergling is entitled to compensation for permanent partial disability, due to a back injury caused by a January 21, 1981 accident, based on the difference between his 1981 pre-injury average weekly wage (\$699.47) and improved weekly post-injury wage-earning capacity, adjusted to 1981 wage levels (\$521.77), such compensation to be computed in accordance with Section 8 (c) (21) of the Act. According to that computation, effective January 1, 2002, Mr. Bergling's weekly permanent partial disability compensation rate is \$118.47.

In light of my revision to Mr. Bergling's permanent partial disability compensation award effective January 1, 2002, I have three related comments. First, the Special Fund can not obtain recompensation under the Act when a claimant receives payment of compensation to which he is later determined not to be entitled. *See generally Ceres Gulf, v. Cooper*, 957 F.2d 1199 (5th Cir. 1992), and *Stevedoring Servs. Of America v. Eggert*, 953 F.2d 552 (9th Cir.), *cert. denied*, 505 U.S. 1230 (1992). Second, because interest is not considered "compensation" under the Act, the Special Fund may not receive credit under Section 14 (j) against an interest award based on overpayment of disability compensation. *Castronova v. General Dynamics Corp.*, 20 BRBS 139, 141 (1987).⁹ Third, on the other hand, since the Section 14 (f) penalty is considered "compensation" such that an award of interest on the penalty is also warranted, applying the *Castronova* rationale, the Special Fund may be able to offset under Section 14 (j) a portion of the imposed penalty by the amount of previous overpayments by the Special Fund to Mr. Bergling since January 1, 2002 due to my compensation order.

ATTORNEY FEES

Under specific conditions, Section 28 of the Act, 33. U.S.C. § 928, permits the recoupment of a claimant's attorney's fees and costs in the event of a "successful prosecution." However, the courts have determined that attorney fees under this provision may not be assessed against the Special Fund. *Director, OWCP v. Robertson*, 625 F.2d 873 (9th Cir. 1980) and *Director, OWCP v. Alabama Dry Dock & Shipbuilding Co.*, 672 F.2d 847 (11th Cir. 1982). Likewise, the Benefits Review Board has also rejected Special Fund liability for attorneys fees under Section 26 as costs. *Toscano v. Sun Ship, Inc.*, 24 BRBS 207 (1991). Essentially, attorney fees may not be paid out of the Special Fund either as an exception to the American Rule (each party bears its own litigation expenses) under Section 28 or as a cost under Section 26. *Bordelon v. Republic Bulk Stevedores*, 27 BRBS 280 (1994).

ORDER

⁹The BRB stated: "since awards of interest are not explicitly provided for by the Act and serve a different purpose than awards of benefits, interest is not compensation. . . It thus cannot not be offset against compensation payments. . ." *Id.*

Based on my findings of fact, conclusions of law, and the entire record, I issue the following order. The specific dollar computations of the compensation award shall be administratively performed by the DCW Associate Director.

1. The specific relief sought by the Claimant, MR. GEORGE BERGLING, in his request for modification is **DENIED**.
2. Effective January 1, 2002, and continuing, the SPECIAL FUND **SHALL PAY** the Claimant, MR. GEORGE BERGLING, compensation for **PERMANENT PARTIAL DISABILITY**, due to a back injury caused by a January 21, 1981 accident, based on the difference between Mr. Bergling's pre-injury average weekly wage (\$699.47) and his post-injury weekly wage-earning capacity (\$521.77), such compensation to be computed in accordance with Section 8 (c) (21) of the Act.
3. The SPECIAL FUND **SHALL PAY** the Claimant, MR. GEORGE BERGLING, penalties computed in accordance with Section 14 (f) for each overdue permanent partial disability compensation payment that was payable between September 1, 1995 and December 31, 1998.
4. The SPECIAL FUND **SHALL PAY** the Claimant, MR. GEORGE BERGLING, interest, computed in accordance with 28 U.S.C. §1961, for each overdue permanent partial disability compensation payment that was payable between September 1, 1995 and December 31, 1998, for the period of time between each payment due date and January 1999.
5. The SPECIAL FUND **SHALL PAY** the Claimant, MR. GEORGE BERGLING, interest, computed in accordance with 28 U.S.C. §1961, for the Section 14 (f) penalty associated with each overdue permanent partial disability compensation payment that was payable between September 1, 1995 and December 31, 1998.
6. The SPECIAL FUND **SHALL RECEIVE CREDIT**, which may serve as an offset against the amount of penalties directed in Paragraph 3, for all amounts of disability compensation previously paid to the Claimant, MR. GEORGE BERGLING, since January 1, 2002, to the extent the previously paid compensation exceeds the compensation directed in Paragraph 2.

SO ORDERED:

A

RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: June 4, 2003
Washington, D.C.